No. 12033

# United States
# Court of Appeals
## for the Ninth Circuit

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ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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# Transcript of Record

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Upon Petition to Review a Decision of The Tax Court of the United States



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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Petitioner:
A. CALDER MACKAY,
ARTHUR McGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION.

For Respondent:
E. A. TONJES.

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Docket No. 11427

H. M. HOLLOWAY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Amended caption: (See order of 3/29/48) Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor. Year 1944.

DOCKET ENTRIES

1946

June 28—Petition received and filed. Taxpayer notified. Fee paid.

July 1—Copy of petition served on General Counsel.

Aug. 20—Answer filed by General Counsel.

Aug. 20—Request for place of hearing at Los Angeles, Calif. filed by General Counsel.

Aug. 23—Notice issued placing proceeding on Los Angeles, Calif. calendar. Service of answer and request made.

1947

Sept. 30—Hearing set Dec. 1, 1947, Los Angeles.

Dec. 2—Hearing had before Judge Disney on merits. Petitioner's motion to substitute the parties granted. Motion to substitute the parties petitioner and stipulation of facts filed at hearing. Briefs due 1/10/48; replies 2/1/48.

Dec. 19—Transcript of hearing 12/2/47 filed.

1948

Jan. 8—Brief filed by General Counsel.

Jan. 9—Brief filed by taxpayer. Copy served.

Feb. 2—Reply brief filed by taxpayer. Copy served.

Feb. 3—Copy of motion served on General Counsel.

Mar. 29—Order amending caption to read, "Estate of H. M. Holloway, Dec'd., Harvey S. Holloway, Executor," entered.

May 10—Order sustaining objections to Lang's declarations in part and overruling in part, entered.

May 10—Order amending caption to read, "Estate of H. M. Holloway, Dec'd., Harvey S. Holloway, Executor," entered.

May 13—Findings of fact and opinion rendered, Judge Disney. Decision will be entered for the respondent. 5/13/48 Copy served.

May 13—Decision entered, Judge Disney, Div. 4.

June 11—Motion to vacate decision filed by taxpayer. 6/15/48 Denied.

1948

June 11—Motion for reconsideration with memorandum attached filed by taxpayer. 6/15/48 Denied. [1*]

Aug. 9—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, filed by taxpayer.

Aug. 9—Notice of filing petition for review filed by taxpayer with proof of service attached.

Aug. 18—Statement of points and designation of parts of record to be printed with proof of service thereon filed by taxpayer.

Aug. 18—Designation of contents of record on review, proof of service thereon, filed by taxpayer. [2]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 11427

H. M. HOLLOWAY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

## PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:GT:90D:NAB) dated May 9, 1946, and as a basis of this proceeding alleges as follows:

I.

The petitioner is an individual with his principal office at Lost Hills, Kern County, California. His post office address is P. O. Box 310, Lost Hills, California. The gift tax return for the period here involved was filed with the Collector for the Sixth District of California.

II.

The notice of deficiency (copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on May 9, 1946.

III.

The taxes in controversy are gift taxes for the calendar year 1944 and in the amount of $6,421.41.

IV.

The determination of tax set forth in the said

notice of deficiency is based upon the following errors: [3]

a. The Commissioner erred in determining that properties which were the subject of gifts were community properties, none of which had been received as compensation for personal services actually rendered by petitioner's wife or derived originally from such compensation or from the separate property of the wife, and consequently the Commissioner erred in taxing all said gifts to petitioner.

b. The Commissioner erred in determining any gift tax deficiency for the year 1944.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a. At all times material to this proceeding petitioner and his wife, Mary L. Holloway, were living together as husband and wife, residents of the State of California.

b. On August 21, 1944, gifts of common stock of H. M. Holloway, Inc., were made by petitioner and his said wife as follows:

| Donees | Number of Shares | Value |
|---|---|---|
| H. S. Holloway | 333 | $41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| Totals | 777 | $97,125.00 |

c. H. M. Holloway, Inc., was organized on or about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of

H. M. Holloway in exchange for cash and certain properties. Said cash and properties had been acquired through personal services by petitioner and his wife as community income or property over a period of years commencing [4] in or about 1933. Each spouse contributed personal services of equal value in acquiring said cash and properties. Said 800 shares of common stock of H. M. Holloway, Inc., out of which the gifts of 777 shares were made, as hereinabove alleged, constituted community property of petitioner and his wife. One-half of said shares were derived originally from compensation for personal services actually rendered by petitioner's wife or from her separate property.

d. Within the time required by law petitioner and his wife filed separate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of $48,562.50, and each paid the tax shown to be due thereon in the sum of $352.03.

e. The Commissioner erroneously and illegally determined that no part of the properties which were the subject of the gifts was economically attributable to petitioner's wife and he therefore determined, erroneously and illegally, that the total gifts in the sum of $97,125.00 should be taxed to the petitioner, thereby determining the deficiency which is hereby appealed.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that one-half of the properties given were received as compensation for personal services actually rendered

by petitioner's wife or derived originally from such compensation or from separate property of the wife, and determine that there is no deficiency in petitioner's gift tax liability for the calendar year 1944; and grant such [5] other and further relief, including refunds, as to it may seem just and proper in the premises.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner. [6]

State of California,
County of Kern—ss.

H. M. Holloway, being first duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief and that as to those matters he believes it to be true.

H. M. HOLLOWAY.

Subscribed and sworn to before me this 20th day of June, 1946.

(Seal) MAE BUNYARD,
Notary Public in and for said County and State.

My commission expires Oct. 27, 1946. [7]

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

May 9, 1946

Office of Internal Revenue Agent in Charge, Los Angeles Division, LA:GT:90D:NAB

Mr. H. M. Holloway
P. O. Box 310
Lost Hills, California

Dear Mr. Holloway:

You are advised that the determination of your gift tax liability for the calendar year 1944 discloses a deficiency of $6,421.41, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf.

The signing and filing of this form will expedite the closing of your return(x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner,

By GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

Enclosures: Statement, Form of waiver. [8]

LA:GT:90D:NAB
District of Sixth California
Donor: H. M. Holloway
Year: 1944

Statement

| Gift Tax Year | Liability | Assessed | Deficiency |
|---|---|---|---|
| 1944 | $6,773.44 | $352.03 | $6,421.41 |

In making this determination of the federal gift tax liability of the above named donor, careful consideration has been given to the report of the examination dated January 24, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. Arthur G. McGregor, 728 Pacific Mutual Building, Los Angeles 14, California, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Net Gifts

| Schedule A of return: | Returned | Determined |
|---|---|---|
| Total gifts | $ 48,562.50 | $ 97,125.00 |
| Less: Total exclusions | 9,000.00 | 9,000.00 |
| Total included amount of gifts | $ 39,562.50 | $ 88,125.00 |
| Specific exemption | 30,000.00 | 30,000.00 |
| Net gifts for 1944 | $ 9,562.50 | $ 58,125.00 |

## Explanation of Adjustments

| | | |
|---|---|---|
| Schedule A: Totals | $ 48,562.50 | $ 97,125.00 |

It is determined that all of the properties given were community properties of the donor-husband and his wife, none of it having been received as compensation for personal services [9] actually rendered by the wife or derived originally from such compensation or from the separate property of the wife, and are gifts of the donor-husband.

## Computation of Tax

| | Returned | Determined |
|---|---|---|
| Net gifts for 1944 | $9,562.50 | $ 58,125.00 |
| Total net gifts for preceding years | 0.00 | 0.00 |
| **Total net gifts** | $9,562.50 | $ 58,125.00 |
| Tax on total net gifts | $ 352.03 | $ 6,773.44 |
| Total tax payable, 1944 | | $ 6,773.44 |
| Tax assessed: | | |
| Original March 1945 list, page 202, line 1 | | $ 352.03 |
| Deficiency | | $ 6,421.41 |

[Endorsed]: Filed June 28, 1946. [10]

[Title of Tax Court and Cause.]

## ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

### I, II and III.

Admits the allegations contained in paragraphs I, II and III of the petition.

### IV.

Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph IV of the petition.

### V.

(a) Admits the allegations contained in subparagraph (a) of Paragraph V of the petition. [11]

(b) and (c) Denies the allegations contained in subparagraphs (b) and (c) of paragraph V of the petition.

(d) Admits the allegations contained in subparagraph (d) of paragraph V of the petition.

(e) Denies the allegations contained in subparagraph (e) of paragraph V of the petition.

### VI.

Denies each and every allegation contained in the

petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
E. A. TONJES,
Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: Filed Aug. 20, 1946. [12]

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[Title of Tax Court and Cause.]

## MOTION FOR SUBSTITUTION OF PARTY

Whereas, H. M. Holloway, the petitioner above named, died on or about October 4, 1947; and

Whereas, Harvey S. Holloway is the duly appointed, qualified and acting executor of the Estate of said H. M. Holloway, deceased, and is authorized to prosecute the appeal in this proceeding heretofore instituted by said decedent;

Now, therefore, it is respectfully moved that Harvey S. Holloway, as executor of said estate, be substituted in this proceeding as the proper party in the place and stead of H. M. Holloway and that the caption of this proceeding be amended to read as follows:

"The Tax Court of the United States

Docket No. 11,427

H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent." [13]

Dated: November 28, 1947.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 2, 1947. [14]

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[Title of Tax Court and Cause.]

ORDER AMENDING CAPTION

It appearing of record herein that the petitioner, H. M. Holloway, has died since the filing of the petition, and that Harvey S. Holloway, the duly

qualified and acting executor of the estate of H. M. Holloway, deceased, has been substituted as petitioner, it is

Ordered: That the caption herein be amended to read:

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

/s/ R. L. DISNEY,
Judge.

Dated: Washington, D. C., March 29, 1948. [15]

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10 T. C. 110

The Tax Court of the United States

Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated May 13,1948

The decedent, a resident of California, was assisted by his wife in starting a fertilizer business. They started with no capital. She signed notes with

him to borrow money and contributed some services, in the earlier stages. They agreed orally that they would share equally. Later a corporation was formed and the stock was issued in the name of the decedent for assets accumulated by decedent and his wife. A gift of most of the stock was soon thereafter made. Held, on the facts, the gift was not to the extent of one-half made by the wife, one-half of the stock not being received by her as compensation for personal services actually rendered by her, within section 1000(d), of the Internal Revenue Code.

A. Calder Mackay, Esq., and Adam Y. Bennion, Esq., for the petitioner. E. A. Tonjes, Esq., for the respondent. [16]

This proceeding involves a Federal gift tax deficiency in the amount of $6,421.41 for the year 1944. The only issue is whether any portion of the property transferred to the donees was received as compensation for personal services actually rendered by H. M. Holloway's wife, Mary L. Holloway.

In accordance with a motion announcing the death on or about October 4, 1947, of H. M. Holloway (hereinafter referred to as decedent), the duly appointed executor of his estate, Harvey S. Holloway, was substituted for the decedent as the petitioner herein.

The case was submitted on a stipulation of facts and oral testimony. The facts as stipulated are so found. Such parts thereof as it is considered necessary to set forth are in included with other facts found from evidence adduced in our

## FINDINGS OF FACT.

At all times material hereto decedent and Mary L. Holloway lived together as husband and wife. In 1932, decedent and his wife were 63 and 56 years of age, respectively. Neither had any substantial property at that time. During the year 1932, decedent obtained a job as watchman for an oil company in Lost Hills, paying $100 per month. He made his home in a small galvanized iron building on the floor of an oil derrick. Decedent's wife joined him at Lost Hills in February 1933, to care for him after he had fallen and broken some ribs. After she decided to remain there with him, he enlarged the building in which he lived and made it more comfortable. Except for a few days visit in Los Angeles, she remained with him from that time on. He continued his employment as guard at the oil derrick until about 1935. [17]

Some time after moving to Lost Hills, decedent took an interest in outcroppings of gypsum in the vicinity of the oil derrick. The first development he did on this project was on property known as the Theta lease. The first work on the lease was with a pick and shovel and a wheelbarrow. He later borrowed a tractor and a plow from a neighbor and plowed the gypsum so that it could be loaded onto trucks with shovels. He would stay at the gypsum property for hours working in the hot sun. His wife would worry about him and make many trips to see if he was all right. She would also take him his lunch and water to drink.

During the fall of 1934, while still employed as

watchman of the oil property, decedent had opportunity to go to work for an oil company in building a gasoline plant located approximately 10 miles from the oil derrick where he and his wife lived. This employment lasted six or eight weeks. His wife took care of the gypsum interest at that time while he was away, in that she watched the trucks as they would come in, told them where to go to load and where to be weighed; also making a memorandum of names, addresses and truck license numbers of those customers with whom she was not acquainted. Decedent also made frequent trips to the surrounding towns, 60 and 80 miles away, to promote sales of the gypsum, being gone all day and frequently until late at night. His wife would look after the property in a manner similar to that when he was employed in the building of a gasoline plant. In the evenings she would usually go with decedent to get the [18] tickets, and then assist him in computing the poundage and in making up the bills.

Decedent attempted to interest young men in working with him to develop the gypsum property and on several occasions he persuaded some to come there to work with him for their room and board but they stayed with him for only short periods. The decedent's wife boarded and cooked for the men. Occasionally when the demand arose, decedent would hire as extra help on their days off some of the men working at the oil fields. His wife, in 1934 or 1935, suggested that it would be wise for her to return to Los Angeles to secure

employment. He asked her not to do so for no one else would stay there and and help him and that if she would remain, half of anything they made would be hers.

On several occasions it was necessary to borrow a few hundred dollars. The notes were signed by both decedent and his wife. Decedent and his wife had a joint bank account.

Decedent and his wife had accumulated practically nothing up to the year 1937. Some time during that year decedent began operating a larger lease known as the Lang property, which was located about two miles from the oil derrick where he and his wife lived at that time. There was no cost to him of the Lang property other than the payment of a royalty upon extraction of the gypsum. As his activities increased he employed help, so that by 1941 he had a number of employees. About 1939 the daughter of decedent and his wife came to live with them and help decedent, which relieved his wife of considerable of her duties. Decedent's wife went to the site of the Lang property but a few times. [19]

Decedent and his wife built a new house in the vicinity of the oil derrick and moved into it in 1941.

H. M. Holloway, Inc., was organized about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of decedent, in exchange for cash and certain properties, consisting of the equipment being used in the business, about $41,000 cash, and leases with Security Oil

Company and Richfield Corporation. The assets had been accumulated by decedent and his wife between about 1933 and the date of the incorporation, and particularly from about 1937 onward.

The Lang lease was not assigned to the corporation, which operated it under a mining contract from the decedent.

On or about August 21, 1944, gifts of common stock of H. M. Holloway, Inc., were made as follows:

| Donees | Number of Shares | Value |
|---|---|---|
| H. S. Holloway | 333 | $41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| Totals | 777 | $97,125.00 |

Within the time required by law decedent and Mary L. Holloway filed separaate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of $48,-562.50, and each paid the tax shown to be due thereon in the sum of $352.03. The Commissioner determined that the properties above listed were community properties of decedent and Mary L. Holloway, none of which had been received as compensation for personal services actually rendered by Mary L. Holloway or derived originally from such compensation or from the separate property of Mary L. Holloway. [20]

The gift tax return of decedent for the calendar year 1944 was filed with the collector for the sixth district of California.

## OPINION

Disney, Judge: Petitioner and respondent agree that the question in this case is controlled by the application of section 1000(d) of the Internal Revenue Code.[1] The only point on which they disagree is whether any portion of the property, which was subject to the gifts in question, was received as compensation for personal services actually rendered by the wife. The respondent contends that the question is purely one of fact and that the petitioner has the burden of showing to what extent the personal services rendered by his wife contributed to the acquisition of the property in question. The respondent concedes that it is not necessary, in order to come within the meaning of the term "compensation for personal services actually rendered by the wife" that the wife had to render personal services to some third party and to re-

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[1]Section 1000. Imposition of Tax.

(d) Community Property—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

Note:—Section 371, Revenue Act of 1948, amends Section 1000(d) by making it applicable only to gifts made after 1942 and before enactment of the Revenue Act of 1948; therefore, the amendment has no effect in this case.

ceive compensation therefor. "It is sufficient if the acquisition of community property under consideration is shown, to some definite extent, to have been economically attributable to the wife's personal services." (Emphasis ours.] [21]

Language similar to that used by respondent is to be found in the Regulations except for the omission of the above emphasized words. We find the following statement concerning the interpretation of the applicable provision of the above-mentioned section 1000(a) of Internal Revenue Code, in Regulations 108, section 86.2(c):

> Sec. 86.2 Transfers Reached.
>
> (c) Transfers of community property after 1942.—During the calendar year 1943 and any calendar year thereafter any gift of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), except to the extent that such property is shown (1) to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation, or (2) to have been derived originally from separate property of the wife. The entire property comprising the gift

> is prima facie a gift of the husband, but any portion thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

At no place in the Regulations is the term "to some definite extent" used, nor does it appear that such is required by the language of the Code itself. Respondent's position is that the facts presented under the statute and Regulations do not prove petitioner's case. The fact that decedent's wife, in the early days of the development of the gypsum interest, would take him his lunch and drinking water is not showing that any portion of the property here in question is to be economically attributable to her services, for it indicates nothing more than a wife's usual duty. The fact that she took care of the property when decedent was working at the gasoline plant and when he was away developing sales for the gypsum does indicate some contribution of a [22] different nature. The fact that when money was borrowed the notes were signed by both decedent and his wife, indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time, but obviously it does not comply with the statute nor Regulations, which require that the source of the gift to be traced to personal services actually rendered. Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a

sense as to her activity, but plainly the statute requires, not contract, but personal services.

No cases cited to us, and none revealed by our search, have covered the question as to what constitutes "personal services actually rendered by the wife" as the term is used in Section 1000(d) of the Internal Revenue Code. On that phrase the Regulation is no help. Upon examination of all of the facts presented by the record, we have found as a fact that decedent's wife at one time contributed some services. Is the gift of stock economically attributable thereto? We do not so consider. The services were performed, in the main, in the earlier years and it appears that there was only a small amount of savings by 1937, when the Lang lease was taken over, and after which she seems to have performed no services. Thus there is a break in the connection between her services and any later business or property. Though there is evidence that the property which was turned into the corporation for stock which was the subject of the gift here involved was accumulated by the decedent and wife after 1933, in the light of the further evidence indicating no services after 1937, we can not say that the property given away in 1944 was economically attributable to her services. [23]

Another difficulty with petitioner's theory here is the fact that the stock donated was issued, in part for leases from Security Oil Company and Richfield Oil Corporation. No showing is made to connect these leases in any way with the wife's personal services. Yet they may have constituted

in large degree the consideration for issuance of the stock. We note too from the evidence that the Lang property, earlier held, was not transferred to the corporation, but that the corporation entered into a mining contract with the decedent, and the corporation operated thereunder. Even if the wife had contributed personal services to the Lang lease—and she "never went there very often. I went a few times"—the lack of connection or economic attribution between the corporate stock donated and her services is plain; and of course it is plainer as to the period prior to the Lang lease and to 1937, by which time such services as she had contributed had resulted in accumulation of "practically nothing." In the light of the evidence, the statute and the Regulation interpreting it, we hold that decedent's wife did not contribute such services as to bring her within the meaning of section 1000(d) of the Internal Revenue Code and that one-half of the property transferred to the donees was not received as compensation for personal services actually rendered by her.

Reviewed by the Court.

Decision will be entered for the respondent. [24]

Johnson, J., dissenting: In my opinion the facts found disclose participation by the wife in decedent's business to a degree which greatly exceeds "a wife's usual duty" and supports a conclusion that her personal services were a substantial factor contributory to business success and were commensurate with decedent's efforts in the early years. During those years decedent was employed,

sometimes at a great distance from the gypsum deposits. During his absences the wife managed their private enterprise, and when he was present, she assisted in the details of operation and accounts. Because her services were valuable, decedent dissuaded her from returning to Los Angeles although their condition of life near the deposits was not pleasant. I am unable to agree with the majority view, feeling that her services were of the type which have supported contrary conclusions in Estate of Frank D. Neumann, 9 T. C. 1120, and E. T. 20, 1947-2C. B. 207.

Leech, J., agrees with this dissent. [25]

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The Tax Court of the United States
Washington

Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 13, 1948, it is ordered and de-

cided: That there is a deficiency in gift tax of $6,421.41 for the year 1944.

Entered May 13, 1948.

(Seal) R. L. DISNEY,
Judge. [26]

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[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner above named, by and through its counsel, and respectfully moves that the Findings of Fact and Opinion promulgated by this Honorable Court in the above entitled proceeding on May 13, 1948, be withdrawn and reconsidered. The grounds and argument in support of this motion are set forth in the Memorandum attached hereto and by this reference made a part hereof.

Wherefore, it is prayed that this motion be granted.

Dated June 9, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner. [27]

[Endorsed]: June 11, 1948.

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[Title of Tax Court and Cause.]

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

The Findings of Fact and Opinion in this proceeding, written by Judge Disney and reviewed

by the Court, with Judges Johnson and Leech dissenting, affirmed the Commissioner's determination that the decedent should be taxed upon the entire gift of community property in 1944 by virtue of Section 1000(d) of the Internal Revenue Code, and that no part of the gift was taxable to decedent's wife. The opinion recognizes that this is a case of first impression under the 1942 amendment of the gift tax law insofar as community property is concerned.

1. Petitioner earnestly asserts that the Court fell into error of law when it made the following statement on page 8 of its report:

> "* * * Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a sense as to her activity, but plainly the statute requires, not contract, but personal services."

If husband and wife agree, for a valuable and adequate consideration in money or money's worth, that they will engage in business as co-adventurers and share the profits equally, we submit that one-half of the profits are economically attributable to each spouse; and it is immaterial whether those profits are held one-half in the name of each spouse, or as [28] joint tenants, or as community property.

This rule was and is universally accepted in respect of joint tenancy property, where it becomes necessary upon the death of a joint tenant to

trace the source of the property. For a long period prior to the community property amendments contained in the Revenue Act of 1942, section 811(e) of the Internal Revenue Code had taxed in the decedent's gross estate all joint tenancy property "except such part thereof as may be shown to have originally belonged to such other person (the surviving joint tenant) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth".

This Court has consistently held upon facts substantially identical to the facts in the present case that an agreement to share the profits of a business will operate to exclude one-half of the joint tenancy property from the husband's estate under the above quoted provision. See Estate of Lester L. Fletcher, 44 B.T.A. 429, and cases cited therein.

Petitioner requests merely the application of the same rule when it comes to tracing the source of community property for estate and gift tax purposes.

The Tax Court has already held that Congress intended the same rule to apply. In estate of Joseph H. Heidt, 8 T. C. 969, it was stated at page 974:

> "In 1942 Congress adopted the amendment to section 811 of the Internal Revenue Code, section 811(e) (2), designed to eliminate what was believed to be an unequal distribution of the tax burdens of estate taxes and to apply to community property the principles of estate

> taxes which had already been applied to other forms of joint ownership on the death of either of the joint owners. See Fernandez v. Wiener 326 U. S. 340, 350. * * *'' [Emphasis added.]

This holding was obviously correct, for the Ways and Means Committee, in reporting the 1942 amendment dealing with community property, stated that— [29]

> ''* * * This follows somewhat the treatment which is accorded to joint estates under the existing law. * * *'' (House Report No. 2333, 77th Congress, 1st Session, C. B. 1942-2, 402.)

The Supreme Court, in Fernandez v. Wiener, 326 U. S. 340, 350, made the same point when it stated:

> ''Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in enacting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners. * * *''

True, the language of the 1942 community property amendment is not identical to the language covering joint property, nor, in view of the nature of community property, could it be identical. (For if the amendment had excluded community prop-

erty which "originally belonged" to the wife, the argument would have been made that one-half of all community property "originally belonged" to the wife under State law, and hence the purpose of the amendment would have been defeated.) But the purpose and intent were the same, as we have shown, and the words actually used ("derived originally from such compensation or from separate property of the wife") are sufficiently broad to cover property acquired under an agreement between the spouses, which agreement was reasonable at the time it was made and was supported by adequate consideration in the form of services rendered theretofore and thereafter, the signing of notes for borrowed funds, and the relinquishment of the wife's right to secure employment elsewhere.

In advancing the foregoing ground for reconsideration the petitioner is raising no new issue. The argument, with lengthy citation and discussion of the Fletcher and similar cases and reference to the legislative history, was covered in petitioner's opening and reply briefs. The Court's opinion [30] in this case would lead one to believe that the parties had presented solely a question of fact. It does not mention the taxpayer's reliance upon the cognate cases dealing with joint property, it does not cite or attempt to differentiate the Fletcher case, nor does it explain why, in the light of the Congressional history, the same agreement should produce one result as applied to joint property and the opposite result as applied to community property. We respectfully submit that the

Court has committed reversible error of law and has failed to carry into effect the obvious intent of Congress.

Since this is a case of first impression on this point and the case has been reviewed by the full Court, we believe that the taxpayer is entitled in all fairness to have all the Judges cognizant of the principal issue thus presented.

2. The second ground for reconsideration is as follows:

The Tax Court found that money needed in the business was borrowed on the joint credit of decedent and his wife, and stated (page 8) that this "indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time". It also found that "decedent's wife at one time contributed some services". It also found that in 1934 or 1935 decedent and his wife agreed that "half of anything they made would be hers". There is nothing in the Findings of Fact or Opinion to indicate that this agreement was other than reasonable and bona fide at the time it was made.

Yet the Tax Court goes on to hold that "there is a break in the connection between her services and any later business or property".

By this holding the Court in effect overrules its decision in Estate of Lester L. Fletcher, 44 B.T.A. 429, 435, where it stated: [31]

> "* * * The original contribution of $1,000 and Mrs. Fletcher's subsequent services in the store constitute 'an adequate and full consider-

ation in money or money's worth.' See Richardson v. Helvering, supra. All subsequent accretions or accumulations related back to the original consideration." (Emphasis added.]

Similarly, in the present case the agreement applied to all subsequent accumulations in the gypsum business, and consequently the Court erred in holding that there was a "break in the connection" and in going further, on page 9 of the Opinion, to indicate a failure of proof since the leases from Security Oil Company and Richfield Oil Corporation might have constituted "in large degree" the consideration for the stock. The fact is that they did not; but our point is that, whether they did or not, one-half of them was the property of Mrs. Holloway since they "related back to the original consideration".

Dated June 9, 1948.

Respectfully submitted,

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

[Endorsed]: Filed June 11, 1948. [32]

[Title of Tax Court and Cause.]

## STIPULATION OF FACTS

The parties above named, by and through their respective counsel, hereby stipulate as follows:

1. At all times material hereto H. M. Holloway and Mary L. Holloway lived together as husband and wife, residents of Lost Hills, Kern County, California. The gift tax return of H. M. Holloway for the calendar year 1944 was filed with the Collector for the 6th District of California. H. M. Holloway died on October 4, 1947, after his petition had been filed herein, and his estate, by its executor, Harvey S. Holloway, has been duly substituted in his stead.

2. On or about August 21, 1944, gifts of common stock of H. M. Holloway, Inc. were made as follows:

| Donees | Number of Shares | Value |
|---|---|---|
| H. S. Holloway | 333 | $41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| Totals | 777 | $97,125.00 |

3. Within the time required by law H. M. Holloway and Mary L. Holloway filed separate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of $48,562.50, and each paid the tax shown to be due thereon in the sum of $352.03. The Commissioner determined that the properties above listed were community properties of H. M. Holloway and

Mary L. Holloway, none of which had been received as compensation for personal services actually rendered by Mary L. Holloway or derived originally from such compensation or from the separate property of Mary L. Holloway.

4. H. M. Holloway, Inc., was organized on or about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of H. M. Holloway in exchange for cash and certain properties.

Dated this 2nd day of December, 1947.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

CHARLES OLIPHANT,
Chief Counsel Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: Filed Dec. 2, 1947. [34]

The Tax Court of the United States

Docket No. 11427

EXECUTOR OF THE ESTATE OF
H. M. HOLLOWAY, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room No. 229,

United States Post Office and Court House Bldg.,
Los Angeles, California.

December 2, 1947—3:05 p.m.

(Met pursuant to notice.)

Before: Honorable Richard L. Disney, Judge.

Appearances: A. Calder Mackay, Adam Y. Bennion, Pacific Mutual Building, Los Angeles, California, appearing for the Petitioner. E. A. Tonjes, (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [36]

PROCEEDINGS

The Clerk: Docket 11427, H. M. Holloway.

The Court: This is the gift tax case, as I understand it. Make your statement for the Petitioner.

Mr. Bennion: A. Calder Mackay and Adam Y. Bennion for the Petitioner.

Mr. Tonjes: E. A. Tonjes for the Respondent.

Mr. Bennion: We have a similar motion, for the substitution of the estate or I mean the executor for Mr. Holloway.

Mr. Tonjes: No objection.

The Court: The motion will be granted and the estate will be substituted, the executor will be substituted, and the caption amended.

Opening Statement on Behalf of the Petitioner By Mr. Bennion:

Mr. Bennion: The tax involved here is a gift tax in the calendar year 1944 in the amount of $6,421.41. On August 21, 1944, seven hundred and seventy-seven shares of stock of H. M. Holloway, Incorporated, were given to H. S. Holloway, Marian S. Knox, Claude O. Knox, who were the son and daughter and son-in-law of Mr. and Mrs. H. M. Holloway. That corporation had been organized about three weeks prior to that time, on August 1st, 1944, and at the date of incorporation certain assets were turned over in exchange for stock, consisting of cash, gypsum mining equipment, [38] and the lease.

This property that was turned over to the corporation was community property, and on gift tax returns, for the calendar year 1944 H. M. Holloway and Mary L. Holloway, his wife, each reported one-half of the gift to these donees. The Commissioner has determined that these shares of stock constitute community property no part of which had been derived originally from the separate property of Mrs. Holloway or from her personal services, and under the 1942 amendment to the gift

tax law, he determined that the entire gift was taxable to Mr. Holloway.

There is no question in this proceeding regarding the value of the gift. The parties have stipulated what was given and their values. The sole issue is whether or not Mrs. Holloway's personal services contributed to the acquisition of these properties that were given to the children, and it will be the purpose of the evidence to show how those properties were acquired and just what contribution was made by Mrs. Holloway.

In that connection a relevant bureau ruling was just issued, came out a day or two ago, E. T. No. 20, which reviews the legislative history of this change in the community property law as far as gift tax is concerned, and rules that the performance of personal services by the wife can qualify as her contribution to community property, and [39] that it need not be personal services performed for other persons for a salary. In other words, the issue is whether or not the property in question is economically attributable to the wife. It is the Petitioner's position here that Mrs. Holloway—that one-half of this property was economically attributable to Mrs. Holloway.

Mr. Mackay: I will call Mr. Holloway, please. I am sorry.

Mr. Tonjes: That is all right.

Opening Statement on Behalf of the Respondent By Mr. Tonjes:

Mr. Tonjes: My position, your Honor, is that this was not community property and that the evi-

dence will show that whatever services Mrs. Holloway rendered in connection with the parties living in Lost Hills, out at the site of the development of the properties, were those ordinary services that a wife would render to her husband, and that they were not in excess of such services, and therefore under Section 1000 of the Code it should all be regarded as a taxable gift.

The Court: Put on your evidence.

Whereupon,

HARVEY S. HOLLOWAY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [40]

The Clerk: Will you tell us your name, please?

The Witness: Harvey S. Holloway.

Direct Examination

By Mr. Mackay:

Q. Mr. Holloway, are you familiar with the property that was turned in to H. M. Holloway, Incorporated, for its stock in 1944? A. Yes.

Q. What did that property consist of?

A. Well, it consisted of all of the physical properties, that is the equipment that was used in the operation of the business, a matter of some $41,000.00 cash and leases between the Security Oil Company, with the Security Oil Company and the Richfield Oil Corporation.

Q. That is all the assets? A. Yes.

(Testimony of Harvey S. Holloway.)

Q. Do you know when the $41,000.00 had been accumulated by your mother and father?

A. Well, to the best of my knowledge and belief, the entire assets were turned over to the corporation were accumulated by my father and mother between the time in 1933, the date my mother went up there, and this.

Q. The date they were transferred?

A. The date they were transferred.

Mr. Mackay: That is all. [41]

Cross Examination

By Mr. Tonjes:

Q. What did you say the nature of the property was?

A. All of the physical assets such as the tractors and the scrapers and the tools and the equipment, scales, office.

Q. Any other property turned over to the corporation?

A. And the cash, and then the leases that my father held with the Security Oil Company and the Richfield Oil Corporation.

Q. Did he turn over any leases he had from one E. Lang? A. No.

Q. He didn't turn that over to the corporation?

A. No.

Q. What was the nature of the leases that he turned over to the company? His Richfield lease and what was the other?

A. The Security Oil Company.

Q. Security Oil Company?

(Testimony of Harvey S. Holloway.)

A. They were gypsum mining leases.

Q. Gypsum mining leases? A. Yes.

Q. During what period did you say that this property was acquired?

A. In the period of time from the time my mother and [42] father—my father and my mother first went to Lost Hills, to the date of the transfer.

Q. When did your father go to Lost Hills?

A. I think I have that ear-marked at 1933.

Q. When did your mother go to Lost Hills?

A. No, I beg your pardon. My father went to Lost Hills in 1932 and my mother went to Lost Hills in February of 1933.

Q. Did your mother ever engage in business?

A. Yes.

Q. What business was she in?

A. That business at Lost Hills.

Q. And who did she work for?

A. She worked with my father.

Q. With your father. Did she act as secretary?

A. Not to my knowledge.

Q. What did she do?

A. She looked after various phases of the business when he was out on the job, if he had other activities that took him away from the mine, my mother remained there and looked after things.

Q. Did she know anything about gypsum?

A. Does she know?

Q. Did she know anything about gypsum when she went up there? [43]

A. I don't know. I doubt it.

(Testimony of Harvey S. Holloway.)

Q. Would you say no?

A. Yes, I will say no.

Q. I don't want to lead you into falsehoods or anything else. We want the facts. Do you know how much time she spent in the gypsum business as distinguished from the wifely duties of cooking --I presume she did the cooking for your father, they lived there alone did they? A. Yes.

Q. Do you know how much time she devoted to the business of selling gypsum?

A. No, not of my personal knowledge.

Q. You have no knowledge of that. The place where they lived was quite a distance from any stores and so forth? A. Yes.

Q. And did your mother usually see that the supplies were brought in, do you know, or who took care of that? I am referring to living supplies and things of that sort. Do you know?

A. No, only in a general way. I don't know positively.

Q. Well, Mr. Holloway, can you tell me anything specifically that your mother did in connection with the conduct of this business and how much time she devoted to it? [44]

A. I am not competent to tell you that, because I was not there at that time.

Q. That is what I mean.

A. Only on occasional trips to visit the folks.

Mr. Tonjes: Yes. I think that is all.

Mr. Mackay: That is all.

The Court: Just a moment, Mr. Witness. Do I

(Testimony of Harvey S. Holloway.)

understand—sit down, Mr. Witness. I want you to help clear up something here. Do I understand that this corporation went into or continued the gypsum mining business?

The Witness: That is right, sir.

The Court: Was there any assignment to this corporation of your father's rights under the Lang lease, or aside from any lease of the right of going ahead and mining gypsum?

The Witness: Your Honor, there were no assignments from my father to the corporation.

The Court: The corporation had nothing then?

The Witness: The corporation—

The Court: Used whose rights?

The Witness: I might explain, the corporation entered into what we call a mining contract.

The Court: With whom?

The Witness: With H. M. Holloway.

The Court: That is what I wanted to know. He made [45] a contract?

The Witness: That is right. We performed the mining operations for my father under that mining contract.

The Court: He assigned nothing to the corporation, merely made a contract with the corporation, is that right?

The Witness: He assigned nothing pertaining to the Lang property.

The Court: That is what I mean. There was nothing by way of assignment from him as to the Lang property?

(Testimony of Harvey S. Holloway.)

The Witness: No, sir.

The Court: But there was a contract between the corporation and your father—

The Witness: Yes.

The Court: As to the operation of that property?

The Witness: Of that property, yes, sir.

The Court: That is what I wanted to know. That is all. Give me some idea, Mr. Holloway, how often you were at the property between 1932 and 1944.

The Witness: Oh, your Honor, I would say that my visits up there were at times maybe twice a year, sometimes three or four times a year.

The Court: How long did you stay when you went up there?

The Witness: Overnight, possibly over the week-end. [46]

The Court: That is all.

(Witness excused.)

Whereupon,

MARY L. HOLLOWAY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, please?

The Witness: Mary L. Holloway.

Direct Examination

By Mr. Mackay:

Q. Mrs. Holloway, I dislike to ask a women her age, but would you mind telling the Court?

(Testimony of Mary L. Holloway.)

A. I am 71 years of age.

Q. You are 71 years of age? A. Yes, sir.

Q. You are the widow of H. M. Holloway, who has recently died? A. Yes, sir.

Q. And you were married to him, for many years prior to his death?

A. I was married to him in 1896. We were married nearly 51 years.

Q. Do you remember when he went to Lost Hills? A. I remember it very well. [47]

Q. When was that, Mrs. Holloway?

A. July 1st, 1932.

Q. In 1932? A. In 1932, July 1st.

Q. Did he go up there by himself?

A. He went up by himself.

Q. Did he have employment up there?

A. Yes, he was offered employment as watchman on the property immediately adjacent to the gypsum property that we afterward developed. He was employed as a watchman on an oil derrick, on an oil well.

Q. For some time did he live there by himself?

A. For up until the 1st of February of 1933.

Q. And then you joined him?

A. And then I joined him.

Q. Did he have a place to live up there?

A. Well, he had a roof over it and it had four walls.

Q. What was it? A. It was a—

Q. The basement of the derrick of the oil well?

A. No, it was a litle galvanized iron building

(Testimony of Mary L. Holloway.)

on the derrick floor, what is commonly known as the dog house.

Q. And he fixed that up, did he?

A. Well, when he went up there it was full of cracks and the wind came through and the dust, and he closed it up [48] and made it possible to inhabit the place.

Q. Did he build himself a bed also up there out of rough lumber?

A. Yes. When he went up there, Mr. Holloway —it was just during the depression and Mr. Holloway was broke.

Q. Didn't have any money?

A. We didn't have any money. We had exhausted our savings during the months of our unemployment and he went up there because he was offered a meal-ticket.

Q. And at that time how old was he?

A. He was 63.

Q. 63? A. 63, I think.

Q. Then you joined him?

A. In February of 1933 I had a letter from him in—soon after the first of January, telling me that he had fallen and broken his ribs, and he had slipped in the mud and had fallen and struck a piece of pipe and broken his ribs. I was very distressed about it and I wrote to him to go to a doctor immediately, which he did and had his ribs taped up. The following Sunday I had my daughter and her son take me up there, and I saw that he needed me and I told him that if he would make

(Testimony of Mary L. Holloway.)

room for me that I would come and stay there with him.

Q. Did he make room for you? [49]

A. He did. He enlarged the place a little and fixed it up a little so that it was more comfortable, built a—put in a built-in bed, and he had secured some gas from the oil hole and had gas lights and was using gasoline for fuel, and he had taken an oil drum and made a heating stove out of it which was very adequate. So I told him that if he could stand it all the time that I could stand it part of the time, and he said, "Well, you can do anything. Anything is possible if you want to do it enough."

Q. So then you—

A. I remained there with him for nine months without leaving.

Q. Without leaving? A. Without leaving.

Q. And then how long were you gone after that nine months?

A. Oh, I went down with my son to Los Angeles for a few days only.

Q. Then you went back?

A. Then I went back.

Q. At the time you went up there in 1933 he was still on the payroll of this oil well company as a guard? A. He was.

Q. Do you remember how long that employment lasted? A. I think until about '35. [50]

Q. Until 1935? A. I think so, about '35.

Q. Was he receiving at that time—was it about a hundred dollars a month?

(Testimony of Mary L. Holloway.)

A. That is right, a hundred dollars a month.

Q. Did you have any money left over at the end of the month after paying for your food, fuel and gasoline? A. Well, very little.

Q. Most of that hundred dollars a month then was used for living expenses?

A. For living expenses, yes.

Q. Now, do you recall when he first got suspicious that there might be some gypsum up here, in the near vicinity of where you were living?

A. Talked it over with my younger son, who is now deceased, and he told his father about the gypsum being there, and they discussed it and the possibilities of there being something done with it, and my husband saw that there was an opportunity and he decided that he would try to develop the gypsum deposit.

Q. That was on the Theta lease, was it?

A. That was on the Theta lease, yes.

Q. Did your husband try to develop the Theta lease shortly after that? A. Yes, he did. [51]

Q. How did he develop it?

A. Well, he went out with a pick and shovel and wheelbarrow. He made cuts in the hillside to develop, to find the depth of deposit, and to make an opportunity to build a ramp for loading. His first equipment was a Fordson tractor which he rented from a neighbor of ours, and a plow. He followed the plow and the other man drove the tractor, and they plowed up the gypsum so that it could be loaded with shovels on to the trucks.

(Testimony of Mary L. Holloway.)

Q. And did you sell that gypsum to farmers in the vicinity? A. Yes, we did.

Q. Gypsum is used for fertilizing, isn't it?

A. Yes, soil conditioner.

Q. And the farmers came to this deposit to take their gypsum away?

A. Well, they came and they did their own loading with their shovels a great deal of the time, hand shovels.

Q. Until you got going better?

A. Until we got going where we had other equipment.

Q. And when you got other equipment for it they used that and loaded automatically?

A. Yes, they used a Fresno scraper, what is called a Fresno scraper, at one time, and I think that was borrowed. [52]

Q. Then you continued living in there and helping your husband with the—

The Court: Don't lead your witness.

Mr. Mackay: I beg your pardon.

The Witness: I did.

The Court: Strike the answer.

Mr. Mackay: I will ask you to please—that is my error. Please state what you did.

The Witness: Mr. Holloway—

Mr. Mackay: During the period—let me finish, please.

By Mr. Mackay:

Q. What you did with respect to assisting him during the period say from 1934 to say around the middle or about the middle of 1940?

(Testimony of Mary L. Holloway.)

A. Want to know what I did?

Q. Yes, what you did.

A. When Mr. Holloway was compelled to be away I stayed there and—

Q. Was he away very often?

A. He was away quite often. He was away at one time in the fall of 1934, I think, he had other employment. He had an opportunity to go to work for an oil company in building a gasoline plant and he was employed there for a period of some several weeks, probably six or seven, possibly eight [53] weeks.

Q. Who took care of the property at that time when he was away?

A. Well, I looked after it. I watched the trucks as they would come in, told them where to go and load, told them where to go to be weighed. If I was not acquainted with them I would go up on the hill and get their names and their license numbers and make a memorandum of who they were and where they lived, so that when he came home at night I could give him that information.

Q. Now, after you got going a little better, was it necessary to promote sales?

A. Very necessary.

Q. Who did that?

A. Mr. Holloway did that.

Q. Which would take him away from the property? A. Yes.

Q. Where would he go to do that?

A. Oh, he would go to neighboring outlying towns—Porterville—

(Testimony of Mary L. Holloway.)

Q. About how far would that be from the property?

A. Oh, anywhere from 60 to 80 miles, and at times he went to Fresno, he went to Modesto. He would be gone for possibly a day, until late at night.

Q. When he was gone there rustling sales, who took [54] care of the property and was watching it?

A. I stayed there and watched things and did what I could to take care of the people as they came.

Q. Well, when the people would come there what would you do?

A. I would direct them to the gypsum, and tell them where to get their loads, how to load it, where to go to be weighed. In the evening we would usually go down and gather up the tickets, then we would come back home and I would assist him in computing the poundage and in making up the bills.

Q. And you did that continuously up until—

The Court: Don't lead your witness.

By Mr. Mackay:

Q. How long did you do that?

The Court: I often tell counsel that I will discount evidence just exactly in the same proportion, and logically I am required to discount it just in exactly the same proportion as it is leading, because of course it is not the witness' testimony.

Mr. Mackay: What was that last question?

(The question was read.)

The Witness: Over a period of several years.

By Mr. Mackay:

(Testimony of Mary L. Holloway.)

Q. Did you ever take any outside employment when you [55] were up there?

A. No, I didn't. I thought of doing so. Mr. Holloway had been trying to interest some younger man in helping him develop the property, and on several occasions he persuaded some young man to come there and stay and help him with the work, and we gave them board, I boarded them, cooked for them and gave them their board, we had to furnish them a place to live, we had to pick out a place where they could sleep, and that went on—Oh, it was—I could think of several people who came there to help him for a short period but none of them stayed with him. There was one time when things were going pretty slow and I told him that I thought that it might be a good idea if I would return to Los Angeles and secure employment, and he said, "No, don't do that." He says, "No one else will stay here and help me, and I want you to do it and we will work it out together, and anything that we make, half of it is yours." He said, "It will be ours between us."

Q. Did you regard that as community property?

A. I did regard that as community property, always.

Q. Were there water facilities up near the pit or the property that he was working on?

A. Yes.

Q. So the workers could get a drink right where they were working, could they? [56]

A. We had water piped in to the oil derrick.

(Testimony of Mary L. Holloway.)

Q. To the oil derrick?

A. To the oil derrick.

Q. Was that in the later years?

A. No, that was—Mr. Holloway piped it in himself. It was soon after he went up there.

Q. It was piped into the oil derrick, you say?

A. Yes.

Q. From some spring?

A. No, a pipe-line which was very near.

Q. How far was the dog house from the gypsum property that was being operated?

A. Oh, a quarter of a mile.

Q. Did you go up to these properties very often? What was the occasion for going up?

A. When I would see some trucker driving in I would go up to find out who he was, and I often went up there at night, sometimes I would see someone drive in and I wouldn't know who they were and I would take my flashlight and go up and make a memorandum of the license number and the name and the residence.

Q. Now, did you or Mr. Holloway ever borrow any money to carry on these operations?

A. Each time—we had to borrow a few hundred dollars several times. [57]

Q. Who signed the notes?

A. We both signed them.

Q. You both signed the notes?

A. We both signed the notes.

Mr. Mackay: You may take the witness.

(Testimony of Mary L. Holloway.)

Cross Examination

By Mr. Tonjes:

Q. Mrs. Holloway, you said you first went to Lost Hills from Los Angeles in 1933?

A. Yes, sir.

Q. And you stayed there until 1934 some time, then came down to Los Angeles again for a short period, is that right?

A. About Christmas time, I think, of that year, probably.

Q. During that period was the property known as the Lang property being operated?

A. No. The Lang property was not. We had nothing to do with the Lang property at that time. That came later.

Q. How far was the Lang property located from the dog house? A. About two miles.

Q. These other properties that you speak of, were they large in comparison with the Lang property?

A. You mean the Theta lease or what properties? [58]

Q. I don't know what the name of it was. You and your husband, as I understand it, were operating some gypsum properties up there, and selling gypsum to the farmers? A. Yes.

Q. What name did you give to those properties?

A. The Theta Land Company.

Q. Fada? A. Theta.

Q. How does that compare in size with the Lang properties?

(Testimony of Mary L. Holloway.)

A. It is very small compared with the Lang.

Q. Very small. How long did you operate those properties?

A. Well, I think we must have operated those properties for two years at least.

Q. About two years. So perhaps in the early part of 1936 then you were through with those properties?

A. No, we were still there in 1936.

Q. Did you continue to operate them after that?

A. We were still operating that property in the early part of 1937.

Q. And do you know how much money you had accumulated by that time?

A. We had accumulated practically nothing at that time. [59]

Q. Up to 1937? A. Yes.

Q. And when did you begin operating the Lang properties?

A. I think in—well, I can't answer that exactly. It must have been we had a—oh, in 1937 we commenced on the Lang property, but not as—we had a sub-lease, not from Mr. Lang, from another man.

Q. And now, did you ever employ any people up there to help you with the operation of the Lang lease in those early stages?

A. Yes, we had some employees.

Q. You had some employees almost in the beginning of the operation of the Lang property?

A. Yes.

Q. Where did you live at that time?

A. We still lived at the dog house.

(Testimony of Mary L. Holloway.)

Q. You still lived there? A. Yes.

Q. And how long did you live there?

A. Eight years.

Q. So you must have lived there to 1940, is that right? A. '41.

Q. 1941. How many times did you go over to the Lang properties, we will say in 1937 or '38, when you first [60] started operating it?

A. The Lang property was two miles from our place of abode and I don't recall that I went very often. I went a few times.

Q. You spoke of an occasion when Mr. Holloway went away and took a job in the vicinity?

A. About ten miles away.

Q. About ten miles away. Did he come home nights during that period?

A. Yes, he came home nights.

Q. You said something about some discussion between yourself and Mr. Holloway, about certain properties would be half yours and half his, or words to that effect? A. That is right.

Q. About when was that statement made, if you can recall?

A. I think that that was in probably, in 1935.

Q. In 1935. That was after you had—

A. It might have been in 1934. 1934 or 1935.

Q. Somewhere along 1934 or '35. Did you have in mind that that related to the Theta and the other properties?

A. Whatever property we operated on.

Q. What were you operating at that time, or

(Testimony of Mary L. Holloway.)

what you would operate in the future? What did you have in mind?

A. Yes, we expected to continue and we wanted to [61] build up a business. We expected to continue.

Q. To continue the operation?

A. We were expecting some other leases.

Q. What was your understanding that the interests of the parties would be, if any, in the leases?

A. Mr. Holloway told me that half of anything that he made was mine, "of anything we make, half of it is yours." We had a joint bank account. My signature was just as good on the bank account at all times as his was. It was, I might say that it was his proud boast that his wife was entitled to draw funds as she chose without question, that it was half mine and I was entitled to the use of it.

Q. A very fine compliment to you. You continued to operate the Lang property until 1941, and then you moved over to a—

A. We built a house and it is in the immediate vicinity, and we moved up there in 1941, the 29th day of July, 1941.

Q. 1941? A. Yes.

Q. How far was that house located from the Lang properties? the gypsum properties.

A. Approximately two miles.

Q. Two miles? A. Yes. [62]

Q. And at that time did Mr. Holloway have some employees? A. Oh, yes.

Q. He did?

(Testimony of Mary L. Holloway.)

A. He had a number of employees.

Q. He had a number of employees?

A. Yes.

Q. Did you devote any time to the business at that time?

A. Not so much after that. About 1939 our daughter came to live with us and she proceeded then to help her father and that relieved me of considerable of my duties in that respect.

Q. Do you know when he employed his first outside help, so to speak, what year?

A. I imagine it was in—the first few months he went it alone, except for what help I could give him.

Q. What year was this?

A. That was in 1934. He would go up and work, I would get worried about him and go up to see if he was all right. He would stay up there for hours working out in the hot sun. I would go and take him lunch and water to drink, and see if he was all right, and then I would go back and stay at the house, and the first employees that he had he didn't pay wages to, he gave them their living and— [63]

Q. When was the first time he got someone to work under those circumstances?

A. I think in the summer of probably—the summer or spring of 1935.

Q. Has there been someone helping him, I mean some outside help which has been given to him, since that date? A. Has there been?

(Testimony of Mary L. Holloway.)

Q. Yes, I want to know has he always had some help since 1936? A. Oh, yes.

Q. He had one helper, so to speak, beginning in 1936. When did he get any additional help?

A. Well, I imagine he got at times—he didn't always have help. There were men who were working at the oil fields who were very glad to get extra work and they were working four days a week and their earnings were not sufficient to pay their expenses and to give them the money they needed and when Mr. Holloway needed—if he got in a rush, if he had something that called for extra work, he would employ several of those men on their off days to come and work for him, but it was not a regular employment, it was extra employment.

Mr. Tonjes: I think that is all.

Mr. Mackay: That is all, your Honor.

The Court: Let me ask you a question or two, [64] madam.

The Witness: Yes, sir.

The Court: How soon did you begin to develop the Lang property?

The Witness: In 1937, in the summer of 1937.

The Court: Tell me what you acquired, how that started, what sort of interest you acquired at that time?

The Witness: We had a sub-lease given, that was a lease from Mr. Lang. He was holding a lease from Mr. Lang and he made a lease or made a contract with Mr. Holloway for the development or the mining.

(Testimony of Mary L. Holloway.)

The Court: I must have misunderstood you a while ago. I thought you said when you were first interested in the property that it had nothing to do with Mr. Lang, or words to that effect?

The Witness: No, it didn't in the beginning.

The Court: Did you mean by that a man—

The Witness: He was a customer.

The Court: In the beginning had his rights from Mr. Lang?

The Witness: Yes.

The Court: Or was that before Lang had any rights?

The Witness: Oh, no. We obtained his rights. He was a customer of ours and Mr. Lang contacted him and gave him a lease on their Occidental land, and he in turn came to [65] Mr. Holloway and gave him a lease or a contract to mine the gypsum for him.

The Court: That was in 1937?

The Witness: That was in the spring of 1937 that we secured that.

The Court: Did this contract that your husband get cost anything in the way of money?

The Witness: No.

The Court: What was it, a contract to take out gypsum at so much a ton or something of that kind?

The Witness: For a royalty.

The Court: He didn't have to make a down payment?

The Witness: No, I think the other man did.

(Testimony of Mary L. Holloway.)

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The Court: He didn't have to make a down payment?

The Witness: No, I think the other man did.

(Testimony of Mary L. Holloway.)

The other man did, I believe, but Mr. Holloway didn't.

The Court: That started in 1937?

The Witness: Yes, sir.

The Court: Now, that house that you built after you were living in this dog house, was that built near the dog house?

The Witness: Yes, approximately you might say a distance of a city block.

The Court: And that was about two miles from the Lang property?

The Witness: Yes, sir.

The Court: At least the Lang excavation? [66]

The Witness: Yes.

The Court: That is all I wanted to ask.

Redirect Examination

By Mr. Mackay:

Q. When you speak of working on the so-called Lang property in 1937, was that just on the surface outcroppings? A. Largely, yes.

Mr. Mackay: That is all.

Mr. Tonjes: No further questions.

The Witness: In fact I might say entirely. I should have said entirely.

The Court: Your next witness.

Mr. Mackay: That is all, your Honor. We rest.

The Court: The Petitioner rests.

Mr. Tonjes: Respondent rests.

Mr. Mackay: I beg your pardon. I neglected to offer the stipulation of facts. We have stipulated

(Testimony of Mary L. Holloway.)

to the amounts and dates and we would like to file it.

The Court: The announcement of resting is withdrawn and the stipulation of facts as filed will be received in evidence. You are now resting, Mr. Petitioner?

Mr. Mackay: Yes, your Honor.

Mr. Tonjes: The Respondent rests.

The Court: It ought not to take you a great while to brief this. Until January 10, 1948, for simultaneous [67] briefs, to February 1st for replies.

(Whereupon, at 3:50 o'clock p.m., Tuesday, December 2, 1947, the hearing in the above-entitled matter was closed.) [68]

United States Circuit Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

# PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, and respectfully shows:

## I.

## NATURE OF THE CONTROVERSY

Respondent determined a deficiency in the gift tax liability of the decedent, H. M. Holloway, for the calendar year 1944 in the amount of $6,421.41. The decedent filed a petition with The Tax Court; and his estate, subsequently to his death on October 4, 1947, was substituted as petitioner in his stead. The proceeding was heard at Los Angeles, California, on December 2, 1947, by the Honorable Richard L. Disney, Judge of The Tax Court.

The issue presented below was whether the Commissioner erred in determining that the decedent alone should be subject to gift tax [69] upon a gift of community property during the year 1944, or whether, as petitioner contended, the gift should be taxed one-half to the decedent and the other one-half to his spouse.

In 1932 decedent (then 63 years of age) and his wife (then 56 years of age) were penniless. He obtained a job as watchman for an oil company in Lost Hills, California, paying $100.00 per month. She joined him in February, 1933, and from that time until 1941 they made their home in a small galvanized iron building on the floor of an oil derrick.

While thus employed decedent became interested in outcroppings of gypsum in the vicinity, which he began to work with pick, shovel and wheelbarrow. The gypsum was sold to farmers for use as fertilizer. Decedent built a loading ramp and borrowed a tractor and a plow as operations increased. The farmers would come in their own trucks and load the gypsum themselves. Decedent's employment as watchman for the oil company terminated in 1935. Thereafter he continued his efforts toward building up a gypsum business on leased property, the landowner receiving nothing but a royalty based upon sales of gypsum.

Decedent's wife performed services in the conduct of the business commensurate with decedent's efforts in the early years. Decedent was frequently away from the property, promoting sales of the

gypsum, during which times his wife took complete charge of the property and managed the business. On one occasion in 1934 decedent was away from the property for six or eight weeks, during which time his wife carried on the gypsum business. She at all times assisted in the details of operation and in keeping the books and records and rendering bills. What little capital was required was borrowed on their joint credit.

Decedent recognized that if the business was to become a [70] success, it would be necessary to have the full-time services of someone in addition to himself, and he therefore endeavored to interest young men in working with him to develop the property. On several occasions he persuaded some to work with him in return for room and board, but none would remain permanently. Decedent's wife boarded and cooked for such men. In 1934 or 1935, when they were still struggling along, decedent's wife suggested that she would return to Los Angeles to seek paying employment. Decedent asked her not to go, pointing out that no one else would stay there and help him, and he agreed with her that if she would stay and they made a success of the business together, one-half of the business, of the property acquired and of the income would be hers. She therefore abandoned her plan to return to Los Angeles and worked with him to get the business on its feet.

As the business grew equipment was purchased and it was possible to hire help for cash, which relieved decedent's wife of some of her duties. In August, 1944, the business was incorporated, the

assets (consisting of equipment, cash and certain gypsum leases) being exchanged for 800 shares of the corporation's stock. The corporation was known as H. M. Holloway, Inc. Three weeks later 777 of these 800 shares, having an agreed value of $97,-125.00, were given to the son, daughter and son-in-law of decedent and his wife.

Decedent and his wife filed separate gift tax returns for the year 1944, each reporting one-half of the above gift. The Tax Court, with two Judges dissenting, upheld the Commissioner's determination that the entire gift should be taxed to the decedent alone upon its interpretation of subsection 1000(d) of the Internal Revenue Code, which was added by Section 453 of the Revenue Act of 1942, and which read as follows before [71] its amendment by Section 371 of the Revenue Act of 1948:

> "(d) Community Property. — All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

The Revenue Act of 1948, Section 371, amended

this subsection to make it applicable "only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948."

The petitioner is aggrieved by The Tax Court's Findings of Fact and Opinion and by its Decision, in that no effect is given therein to the rendition by decedent's wife of personal services commensurate with those of decedent, which contributed substantially to the business success, nor to the agreement, reasonable in the light of the circumstances under which it was made and predicated upon the consideration of such substantial services rendered by the wife in the past and contemplated for the future and refraining from exercising her right to seek remuneration for employment elsewhere, that one-half of the earnings and property of their joint undertaking would belong to each spouse. The Tax Court erred in failing to determine that one-half of the property was economically attributable to decedent's wife and therefore was taxable to her for gift tax purposes.

## II.

## COURT IN WHICH REVIEW IS SOUGHT

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code. [72]

## III.

## VENUE

The Findings of Fact, Opinion, and Decision of The Tax Court were entered on May 13, 1948. Decedent's gift tax return for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. Decedent was a resident of the State of California during 1944, for many years prior thereto and thereafter to the date of his death. His estate is in the course of probate in the Superior Court in and for the County of Kern, State of California, and his duly appointed, qualified and acting executor is a resident of the State of California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, petitioner prays that the Findings of Fact, Opinion, and Decision of The Tax Court be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appro-

priate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated August 6, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed August 9, 1948. [73]

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[Title of Circuit Court of Appeals and Cause.]

## NOTICE OF FILING PETITION FOR REVIEW

To: Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner on the 9th day of August, 1948, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the Findings of Fact, Opinion and Decision of The Tax Court of the United States

heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 9th day of August, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner. [74]

Personal service of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 9th day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 9, 1948. [75]

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[Title of Circuit Court of Appeals and Cause.]

## STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

Comes now the Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, Petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds and Adam Y. Bennion, and states that the points on which it intends to rely in this case are as follows:

1. The Tax Court erred in holding and deciding that no portion of the gift made in 1944 repre-

sented property that had been received as compensation for personal services actually rendered by decedent's wife or was derived originally from such compensation or from her separate property, within the meaning of section 1000(d) of the Internal Revenue Code.

2. The Tax Court erred in holding and deciding that there was a break in the connection between valuable services rendered by decedent's wife and the property given away in 1944.

3. The Tax Court erred in failing and refusing to hold and decide that decedent and his wife, pursuant to a valid and reasonable contract fully supported by adequate consideration, were engaged in a joint enterprise or adventure in which each performed vital services and what finances were [76] required were secured upon their joint credit, and as a consequence thereof the property and income accumulated in such joint undertaking belonged to the spouses in equal shares, pursuant to their agreement, and one-half thereof was economically attributable to each spouse within the purview of section 1000(d) of the Internal Revenue Code.

4. The Tax Court erred in that its opinion and decision are not supported by but are contrary to its findings of fact and the evidence, in that the findings of fact disclose the rendition of vital services by decedent's wife and her signature on notes to borrow funds for the business, as well as the fact that she had an agreement with the decedent that if she would help in the business and not seek out-

side employment one-half of anything that was made in the business would be hers, whereas the Tax Court in its opinion and decision holds that no part of the property accumulated in the business was economically attributable to the wife.

5. The Tax Court erred in that its opinion and decision are contrary to law.

Petitioner hereby designates the entire record, as certified to the Clerk of the above entitled Court, as necessary to be printed for the consideration of the points set forth above, including this Statement of Points and Designation.

Dated August 16, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

Personal service of a copy of the foregoing Statement of Points and Designation is hereby acknowledged this 18th day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent. [78]

[Endorsed]: T.C.U.S. Filed Aug. 18, 1948. [77]

[Title of Circuit Court of Appeals and Cause.]

## DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

Comes now the Petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds and Adam Y. Bennion, and hereby designates for inclusion in the record on review in the above entitled proceeding the complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Rule 75(g) of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of the proceedings before The Tax Court.

2. Pleadings:

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

(c) Motion for Substitution of Party.

3. Order Amending Caption.

4. Findings of Fact and Opinion, and Dissenting Opinion, promulgated May 13, 1948.

5. Decision entered May 13, 1948. [79]

6. Motion for Reconsideration and Memorandum in Support of said Motion.

7. Stipulation of Facts.

8. Official report of hearing before the Tax Court on December 2, 1947.

9. Petition for review and notice of filing petition for review.

10. Statement of Points and Designation of Parts of the Record to be Printed.

11. This Designation of Contents of Record on Review.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

Dated August 16, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

ACKNOWLEDGMENT OF SERVICE

Personal service of a copy of the foregoing Designation is hereby acknowledged this 18th day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 18, 1948. [80]

[Title of Cause.]

The Tax Court of the United States
Washington

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 80, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of September, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

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[Endorsed]: No. 12033. United States Court of Appeals for the Ninth Circuit. Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed September 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.